Supreme Court, U. S.
FILED
NOV 6 1975
MICHAEL RODAK, JR., CLERK

No. 75-356

In the Supreme Court of the United States

OCTOBER TERM, 1975

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, ET AL., PETITIONERS

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 511 F. 2d 273. The interlocutory decree of the district court (Pet. App. B, pp. 15a-26a) is not reported. The opinion of the district court (Pet. App. B, pp. 26a-37a) is reported at 334 F. Supp. 976.

QUESTIONS PRESENTED

1. Whether the court of appeals correctly ruled that the district court should order the merger of racially segregated local unions where the record showed and the district court found that the maintenance of such segregated locals historically resulted in depriving individuals of employment opportunities on the basis of their race.

2. Whether, under 28 U.S.C. 1292(a)(1), the court of appeals had jurisdiction to entertain an appeal from an interlocutory denial of a permanent injunction prohibiting the maintenance of racially segregated local unions.

STATUTES INVOLVED

The relevant provisions of Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. 2000e, *et seq.*, and of the Interlocutory Appeals Act, 28 U.S.C. 1292(a)(1), are set forth at Pet. 4-5.

STATEMENT

1. The Attorney General brought this action in 1969 in the United States District Court for the Southern District of Texas pursuant to Section 707 of the Civil Rights Act of 1964, 42 U.S.C. 2000e-6. The complaint alleged that petitioners maintained racially segregated local unions, hiring halls, and work gangs in the Texas Gulf Coast ports and that the segregation tended to deprive black and Mexican-

American longshoremen of equal employment opportunities.[1] The United States sought, among other relief, an injunction against the maintenance of such separate local unions, hiring halls, and work gangs.

The district court found that the International chartered the locals and maintained them on the basis of race or national origin, was always aware of their segregated nature, and did nothing to seek their merger or to charter integrated locals (Pet. App. 29a).[2] The court further found that "Negroes, and in some cases Mexican-Americans, having been segregated on the basis of their race or national origin, have been forced to accept a diminished opportunity to earn wages, receive union benefits, work better cargo and otherwise enjoy employment opportunities solely on the basis of their race" (*id.* at 31a). It accordingly ruled that the government met its burden of showing that "the maintenance of segregated locals constitutes a pattern or practice depriving individuals of working opportunities, because of their race or national origin" (*id.* at 33a).

Black longshoremen generally earned less than their white counterparts for two reasons. First, the

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[1] The Equal Employment Opportunity Commission thereafter was substituted as plaintiff pursuant to Sections 707(c) and (d) of the Act, 42 U.S.C. (Supp. III) 2000e-6(c) and (d).

[2] Of the 37 local unions that are defendants, 16 were for white longshoremen and had no black members, 19 were for black longshoremen and had no white members, and two were composed predominantly of Mexican-Americans (Pet. App. 28a).

"sister" locals ordinarily divided work on a 50-50 basis. Since black longshoremen outnumbered the white longshoremen in most ports, however, the work assigned to the black locals was divided among a greater number of individual black longshoremen (*id.* at 32a). Second, employers primarily hired members of the white locals for positions—such as gearmen—for which union referral was not required (*id.* at 31a).[3]

In addition, the court found that in the ports of Galveston and Brownsville there were "special problems" (*id.* at 27a) resulting from restrictions placed on the referral opportunities available to members of the minority locals. In Galveston, the primarily Mexican-American local was allowed by the International to work only for a limited number of the available stevedoring companies and therefore had little work (see *id.* at 35a). In Brownsville—the only port where white longshoremen outnumbered their black counterparts—the unions disregarded the standard practice of allocating half the work to the white and half to the black local and instead allocated 75 percent of the work to the white local (*id.* at 33a).

Despite the district court's findings with respect to the economic deprivation suffered by blacks as a result of union segregation, the court questioned whether merger of the segregated locals was required

[3] The district court found that the unions had long been aware of this situation but had made no efforts to ensure that members of the black locals had an equal opportunity to obtain such positions (Pet. App. 31a-32a).

to achieve full compliance with Title VII (*id.* at 36a-37a). It thereafter entered an interlocutory decree (*id.* at 15a-26a) ordering that the hiring halls of the segregated local unions be merged on a port-by-port basis.[4] The court denied the government's request to order the merger of the segregated locals themselves, ruling that the violations of Title VII could be adequately corrected by establishing common hiring halls.

2. The United States appealed under 28 U.S.C. 1292(a)(1) from the failure of the district court to enjoin the continued maintenance of segregated local unions. The court of appeals reversed, holding that Title VII requires the merger of the segregated locals. Expressing the majority's view on the merger issue,[5] Judge Thornberry stated that, where the maintenance of segregated locals has been "shown to have had actual discriminatory effect [*sic*] on employment opportunities" (Pet. App. 14a), merger of the locals themselves should be ordered under Title VII. Since the district court "found that employment discrimination resulted from the existence of segregated locals"

[4] That the district court ordered the merger of hiring halls in all ports itself demonstrates the error of petitioners' contention (Pet. 26) that the district court found discrimination to exist only in two ports. Although the court's opinion adverted to the "special problems" in Galveston and Brownsville, it found that minority longshoremen generally were denied equal work opportunities (see Pet. App. 31a, 33a).

[5] Judge Goldberg wrote for the entire panel on the factual and jurisdictional aspects of the appeal. Judge Thornberry, joined by Judge Godbold, filed a special concurring opinion with respect to the merger issue.

(*ibid.*), it should have ordered their merger. The majority accordingly found it unnecessary to decide the question whether, in the absence of a showing of actual employment discrimination, the maintenance of segregated locals would constitute a *per se* violation of the Act (*ibid.*).[6]

Regarding the jurisdictional question, the court of appeals held that the appeal was correctly before it (Pet. App. 5a-7a). The court found that the district court's order was interlocutory in nature because it required the submission of plans for approval and provided that the district court would retain jurisdiction to issue any further orders necessary to ensure equal employment opportunity (*id.* at 5a-6a). The court of appeals also found that the district court's order denied the United States' request for a permanent injunction merging the locals (*id.* at 6a). It held that 28 U.S.C. 1292(a)(1) confers jurisdiction over appeals from denials of permanent as well as preliminary injunctions (*id.* at 6a-7a).

ARGUMENT

The decision of the court of appeals is correct, and further review is not warranted.

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[6] Judge Goldberg, citing a series of cases in which this Court rejected the notion of "separate-but-equal," expressed the view that proof of actual discriminatory impact is unnecessary—in other words that racial segregation of local unions constitutes a *per se* violation of Title VII—since such segregation necessarily "tend[s] to deprive" individuals of equal employment opportunity (Pet. App. 7a-14a).

1. Petitioners contend (Pet. 21-29) that merger of the segregated local unions is not required by Title VII and that the court of appeals' ruling improperly interfered with the district court's remedial discretion under the Act.

Under Section 703(c)(2) of the Act, 42 U.S.C. (Supp. III) 2000e-2(c)(2), it is an unlawful employment practice for a labor organization "to limit, segregate, or classify its membership or applicants for membership * * * in any way which would deprive or *tend to deprive* any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race" (emphasis added). The only other court of appeals that has construed this provision as applied to racially segregated local unions held that it prohibits the maintenance of segregated unions even in the absence of a finding that such segregation has resulted in an actual deprivation of equal employment opportunities; the court ruled that merger of the locals was required. *United States* v. *International Longshoremen's Ass'n*, 460 F. 2d 497 (C.A. 4), certiorari denied, 409 U.S. 1007.[7]

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[7] Several district courts have similarly required merger of segregated local unions. See *Musicians' Protective Union Local 274* v. *American Federation of Musicians*, 329 F. Supp. 1226 (E.D. Pa.); *Hicks* v. *Crown Zellerbach Corp.*, 319 F. Supp. 314 (E.D. La.); *United States* v. *Local 189, United Papermakers and Paperworkers*, 301 F. Supp. 906 (E.D. La.), affirmed, 416 F. 2d 980 (C.A. 5), certiorari denied, 397 U.S. 919.

The National Labor Relations Board has reached the same result for similar reasons. In holding that race and sex-segregated local unions are proscribed by the National Labor Relations Act, the Board stated: "Separate but equal treatment on the basis of sex is as self-contradictory as separate but equal on the basis of race. In both areas separation in and of itself connotes and creates inequalities." *Locals No. 106 and 245, Glass Bottle Blowers Ass'n*, 210 N.L.R.B. 943, enforced, *National Labor Relations Board* v. *Local No. 106, Glass Bottle Blowers Ass'n*, C.A. 6, No. 74-1931, decided July 22, 1975.

In the instant case, the majority of the court of appeals did not find it necessary to decide the question whether the segregation of local unions on a racial basis necessarily tends to deprive individuals of equal employment opportunities. The court held only that where the maintenance of segregated locals has been shown to have an "actual discriminatory effect on employment opportunities" (Pet. App. 14a), it is unlawful under Title VII. Since Section 703(c)(2) forbids a union "to * * * segregate * * * its membership * * * in any way which would deprive or tend to deprive any individual of employment opportunities," the court of appeals was correct in holding that the Act leaves a district court "no discretion to refuse merger" (Pet. App. 14a) once it has found that the segregation has the prohibited effects.

Far from conflicting with this Court's decision in *Albemarle Paper Co.* v. *Moody*, Nos. 74-389 and 74-428, decided June 25, 1975, the court of appeals' ruling is entirely consistent with the holding there. As this Court stated, "[w]here racial discrimination is concerned, 'the [district] court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future" (slip op. 11). Since the system of segregating the locals by race and national origin was shown in this case to have resulted in the deprivation of employment opportunities for members of the minority locals, only the abolition of that system could fully ensure equality of opportunity in the future. Cf. *United States* v. *E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 334.

The holding of the court of appeals, like this Court's holding in *Albemarle*, does not improperly restrict the district court's remedial discretion. Rather, it ensures that the discretion is exercised in accordance with "meaningful standards" and "in light of the large objectives of the Act" (*Albemarle, supra*, slip op. 10). The merger of racially segregated local unions that have caused actual deprivation of employment opportunities should, like an award of back pay on a finding of unlawful discrimination, "be denied only for reasons which, if applied generally, would not frustrate the central statutory purpose * * * of eradicating discrimination throughout the economy" (*id.* at 14). There are no such reasons for denying the merger of the local unions here.

2. The court of appeals had jurisdiction of the appeal in this case. The statute gives the courts of

appeals jurisdiction over appeals from "[i]nterlocutory orders of the district courts * * * granting * * * [or] refusing * * * injunctions" (28 U.S.C. 1292(a)(1)). Petitioners here concede that the district court's denial of the government's requested merger relief "was a denial of the request for a permanent injunction" (Pet. 30). They also concede that "the refusal of an 'injunction,' within the meaning of the [statute] may 'at times embrace denials of permanent injunctions'" (*ibid.*). See *Switzerland Cheese Ass'n* v. *Horne's Market*, 385 U.S. 23, 25.

They challenge the court of appeals' jurisdiction on the ground that the government was required to demonstrate that the district court's order denying the injunction was "'of serious, perhaps irreparable, consequence'" (Pet. 30, quoting from *Baltimore Contractors* v. *Bodinger*, 348 U.S. 176, 181). Neither the statute nor the decisions interpreting it, however, require such a showing. *Baltimore Contractors* and the other cases relied on by petitioners deal with the question whether certain procedural orders—such as the denial of a stay pending arbitration, as in *Baltimore Contractors*—are to be treated as denials of injunctions for purposes of appealability under 28 U.S.C. 1292(a)(1). It is only in resolving that question that the courts have sometimes examined whether an interlocutory order was "of serious, perhaps irreparable, consequence." That inquiry is obviated here, because petitioners do not dispute that the district court's order was a denial of an injunction.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1975.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1975 596029 93